person was Saudi, the first accused, whom I have known for eight years. We both live in the same kampong."

The estate was at Parit Haji Salleh. In his confession accused No. 1 stated that he, appellant and one Zakaria went to the deceased's house on 3rd November 1963 at 9.00 p.m. From the evidence disclosed, it would appear that there was nothing to connect the appellant with the robbery, and therefore there was no evidence for the confession to support. In the circumstances we have no alternative but to allow the appeal.

Appeal allowed.

THANGAULU v. SAUDAGAR SINGH

[A.C.J. (Gill J.) October 3, 1964]

[Muar — Civil Appeal No. 5 of 1964]

Moneylenders — Authenticated copy of memorandum not delivered to borrower — Failure to specify rate of interest in memorandum — Moneylenders Ordinance, 1951, s. 16.

Practice and Procedure — Pleadings — Defence of illegality — Point not raised at trial — Whether this ground can be taken on appeal.

In this case the respondent moneylender obtained judgment against the appellant borrower. The appellant had signed a promissory note and had acknowledged receipt of the authenticated copy of the memorandum. At the trial the only point taken was that no authenticated copy of the memorandum was delivered to the borrower at the time of the contract. The learned president of the Sessions Court held, on this point, that as the appellant had acknowledged receipt of the authenticated copy and had not produced the copy delivered to him to show that it was not authenticated, the moneylender had complied with the requirements of the Moneylenders Ordinance and gave judgment in his favour. On appeal the appellant also relied on the further points that (a) in the memorandum the lender's name was shown as that of the borrower and the borrower's name as that of the lender and (b) that the rate of interest was not specified in the memorandum.

Held: (1) the learned president was right in deciding that the moneylender had complied with the provisions of the Moneylenders Ordinance in so far as the supply of the authenticated copy of the memorandum was concerned;

(2) the failure to specify the rate of interest was in breach of the provisions of section 16(3) of the Moneylenders Ordinance and therefore the contract was unenforceable;

(3) as in the pleadings the defence of illegality had been raised the appellant was entitled to take the point on the appeal although he had not raised it at the trial.

Cases referred to:—

(1) *Kartar Singh* v. *Mahinder Singh* [1959] M.L.J. 248.

(2) *Subramaniam* v. *Konar* [1962] M.L.J. 385.

(3) *Natha Singh* v. *Syed Abdul Rahman & Anor.* [1962] M.L.J. 265.

(4) *Lipton* v. *Powell* [1921] 2 K.B. 51 at p. 58.

(5) *North-Western Salt Co.* v. *Electrolytic Alkali Co.* [1914] A.C. 461.

CIVIL APPEAL.

C. M. Perumal Pillai for appellant.

C. P. S. Wong for respondent.

Cur. Adv. Vult.

Gill J.: This is an appeal from a decision of the Sessions Court at Muar, whereby judgment was entered against the appellant, whom I shall call the borrower, in the sum of $1,725 together with interest thereon at the rate of 6% per annum from the date of judgment to the date of realization and costs. The judgment appealed from was given in pursuance of a claim by the respondent, who is a licensed moneylender, founded on a promissory note dated the 18th of October, 1961 executed in his favour by the borrower for a sum of $1,500 bearing interest at 18% per annum.

In his original statement of defence the borrower pleaded that the amount lent to him was $500 and not $1,500 as alleged by the moneylender and that he had repaid $150 in six instalments of $25 each between November 1961 and April 1962, for which the moneylender had refused to issue receipts. In a statement of additional ground of defence the borrower said that in the matter of execution of the promissory note the moneylender had not complied with the provisions of section 16(1) of the Moneylenders Ordinance, 1951. He further alleged that the moneylender fraudulently induced him to enter the figure of $1,500 on the promissory note instead of the figure of $500 by representing to him that the additional sum of $1,000 should be included in the promissory note as security for the repayment of $500 which was the amount actually lent. The borrower then filed an amended statement of defence which, shorn of its verbiage, raised the following defences:

(a) that the execution of the promissory note was a fraudulent transaction so that the contract entered into for the repayment of money was void in law; and

(b) that the contract for the repayment of the money lent on the promissory note and for the payment of any interest on the money lent or for the recovery of any security was not enforceable as the plaintiff had not strictly complied with the provisions of section 16(1) and section 16(3) and section 27 of the Moneylenders Ordinance, 1951.

At the trial of the action the moneylender gave evidence to say that on 18th October, 1961 he lent the borrower a sum of $1,500 and that the borrower executed a promissory note and signed two copies of a memorandum. Both the promissory note and the memorandum were produced and marked as Exhibits P.1 and P.2 respectively. The moneylender went on to say that the borrower himself wrote out the documents and that he gave a copy of the memorandum to the borrower. He denied that the borrower had repaid a sum of $150 as interest, claiming that if interest had been paid he would have issued

receipts and entered the amounts of interest in his account book. He then produced his account book, which was marked as Exhibit P.5. The borrower gave no evidence at the trial.

At the end of the trial Enche Perumal Pillai submitted on behalf of the borrower that the moneylender had not complied with section 16(1) of the Moneylenders Ordinance and referred to *Kartar Singh* v. *Mahinder Singh.*[1] Enche C. P. S. Wong on behalf of the moneylender referred to *Subramaniam* v. *Konar* [2] and asked if the borrower's counsel had abandoned section 27 of the Moneylenders Ordinance, whereupon Enche Pillai said that he did not want to pursue that point.

It will be observed that the only point taken by Enche Pillai at the trial of the action was that no authenticated copy of the memorandum was delivered to the borrower at the time of the contract. For his submission at the end of the case he was relying on the case of *Kartar Singh* v. *Mahinder Singh,*[1] in which it was held that the onus was upon the plaintiff to prove that the requirements of the Moneylenders Ordinance had been complied with. In reply to that submission Enche Wong relied on the case of *Subramaniam* v. *Konar,*[2] in which Thomson C.J., as he then was, held that although the burden of proving that an authenticated copy of a promissory note (or memorandum) was handed by the moneylender to the borrower under section 16(1) of the Moneylenders Ordinance, 1951 is on the moneylender, nevertheless, a written acknowledgment by the borrower on the promissory note or the memorandum is sufficient, if unrebutted, to establish that the copy which was handed to him was authenticated. In the present case the borrower had signed an acknowledgment of receipt of a copy on the memorandum itself and he gave no evidence in rebuttal, nor did he produce the copy delivered to him by the moneylender to show that it was not duly authenticated. In the circumstances the learned president decided that on the point raised the moneylender had complied with the requirements of the Moneylenders Ordinance and gave judgment in his favour.

The memorandum of appeal filed by the appellant's solicitor, Enche Pillai, is more in the nature of a legal opinion on the case and raises the main question as to whether section 16 of the Moneylenders Ordinance had been complied with. His arguments in support of the appeal are, firstly, that there is no proof of an authenticated copy of the memorandum having been delivered to the borrower at the time of the contract, secondly, that in the memorandum the lender's name is shown as that of the borrower and the borrower's name as that of the lender, and thirdly, that the rate of interest is not specified in the memorandum.

As I have stated above, the first point was taken at the trial of the action before the learned president and it failed. I need only add that in the light of the evidence given by the moneylender it was bound to fail. There was no evidence that a copy of the promissory note as well was delivered to the borrower, so that it could not be argued that copies of the two documents constituted a sufficient memorandum as to all the terms of the contract. The points about the names of the borrower and the lender having been entered in the wrong places in the memorandum and the absence of the rate of interest in the memorandum were not taken at the trial. Nothing very much turns on the first of these points because the memorandum started off with the name and address of the borrower, so that it is sufficiently clear who the borrower and the lender were. The second point, however, goes to the root of the matter. This was a point which should have stared everybody in the face because section 16(3) specifically lays down that one of the essential terms to be contained in the memorandum is the rate of interest. Had the attention of the learned president been drawn to it or had he considered it himself, I have no doubt that he would have come to the conclusion that the contract was unenforceable.

The only point to be considered at this appeal, therefore, is whether there is any substance in the argument put forward by Enche C. P. S. Wong on behalf of the moneylender that the borrower cannot now rely on this ground which was not raised before the learned president. This point was considered by Hepworth J. in *Natha Singh* v. *Syed Abdul Rahman and Anor.,*[3] in which his Lordship said that where a point as to the illegality of a contract was not taken in the court below, there are two cases in which the judge may intervene and refuse to enforce the contract. These two cases, as his Lordship said, are clearly set out by Lush J. in a judgment of the Divisional Court in *Lipton* v. *Powell,*[4] the subject matter of which was also a money lending transaction. One of these cases is that in which the contract *ex facie* shows illegality. In a case of that kind the court is entitled and indeed bound to intervene and refuse to enforce the contract. The other case in which the judge may refuse to enforce the contract is that in which, although *ex facie* the contract is legal, yet in the course of the proceedings an admission is made or evidence is given by which its illegality clearly appears. In *North Western Salt Co.* v. *Electrolytic Alkali Co.*[5] Lord Haldane L.C. said:

"My Lords, it is no doubt true that where on the plaintiff's case it appears to the court that the claim is illegal, and that it would be contrary to public policy to

entertain it, the court may and ought to refuse to do so. But this must only be when either the agreement sued on is on the face of it illegal, or where, if facts relating to such an agreement are relied on, the plaintiff's case has been completely presented. If the point has not been raised on the pleadings so as to warn the plaintiff to produce evidence which he may be able to bring forward rebutting any presumption of illegality which might be based on some isolated fact, then the court ought not to take a course which may easily lead to a miscarriage of justice. On the other hand, if the action really rests on a contract which on the face of it ought not to be enforced, then, as I have already said, the court ought to dismiss the claim, irrespective of whether the pleadings of the defendant raise the question of illegality."

In the present case it is clear that the borrower on his pleadings raised the defence of illegality of the contract by reason of the non-compliance with the provisions of section 16 of the Moneylenders Ordinance. Had the learned president scrutinized the memorandum, which was produced in evidence, in the context of section 16(3) of the Ordinance, he would have noticed that the contract on the face of it was illegal. Moreover, the borrower, having raised this point on his pleadings, is entitled to take it on this appeal, and if that point is now taken, this appeal must succeed. I accordingly allow the appeal, set aside the judgment of the learned president and order the deposit paid into court by the appellant to be paid back to him. The respondent must pay the costs of this appeal and the costs of the action in the court below.

Appeal allowed.

Solicitors: *C. M. Perumal Pillai*; *C. P. S. Wong & Co.*

CHIU NANG HONG v. PUBLIC PROSECUTOR

[P.C. (Lord Reid, Lord Hodson and Lord Donovan) July 23 and October 5, 1964]

[Privy Council Appeal No. 16 of 1964]

Penal Code, s. 376 — Rape — Evidence of complainant — Need for corroboration — Conviction without corroboration — Duty of judge sitting alone to indicate clearly his appreciation of risk involved.

Criminal law — Corroboration — Conviction of rape — Corroboration wrongly found by trial judge sitting alone — Miscarriage of justice.

Courts Ordinance, 1948, s. 29(1) — Court of Appeal — Powers of.*

In this case the appellant was convicted of rape. At the trial there was a direct conflict of evidence between the appellant and the complainant as to whether there was consent to the intercourse which took place — the complainant alleged she was frightened into submission, the appellant saying that she willingly agreed. The learned trial judge believed the complainant's evidence and said "I could not but come to the conclusion that she was speaking the truth and that in all the material circumstances her evidence was corroborated by the facts". On appeal the Court of Appeal ([1963] M.L.J. 119) decided that it could not interfere with the learned judge's decision, as the learned judge had seen and heard the witnesses; he was aware of the danger of convicting without some corroborative evidence of the complainant's story and knew that there was no such evidence; but nevertheless he was convinced of the truth of the complainant's story and was therefore entitled to convict the appellant. The appellant having been granted special leave to appeal to the Privy Council,

Held: (1) in this case the circumstances did not afford corroboration of the complainant's allegation of no consent and as the case was one where the appellant has been convicted on the basis that the complainant's allegation was corroborated when it was not, there had been a miscarriage of justice bringing the case within the category of cases where the Board will intervene;

(2) in a case where the trial judge had in mind the risk of convicting without corroboration but nevertheless decided to do so because he was convinced of the truth of the complainant's evidence, the judge should make it clear that he has the risk in question in his mind, but nevertheless is convinced by the evidence, even though uncorroborated, that the case against the accused is established beyond any reasonable doubt. No particular form of words is necessary for this purpose: what is necessary is that the judge's mind upon the matter should be clearly revealed;

(3) as there was an ambiguity on the point it should be resolved in favour of the appellant because the liberty of the subject was involved.

PRIVY COUNCIL.

Dingle Foot Q.C. and *Dick Taverne* for the appellant.

W. P. Grieve Q.C. and *W. A. B. Forbes* for the respondent.

On July 23 Lord Reid announced that their Lordships would report to the Yang di-Pertuan Agong their opinion that the appeal should be allowed, and they would give their reasons later.

The reasons for report of the Lords of the Judicial Committee of the Privy Council were delivered on October 5, 1964 by,

Lord Donovan: The appellant was convicted in the High Court of Kuala Lumpur on 22nd November 1962 of rape and sentenced to eighteen months imprisonment. His appeal to the Court of Appeal at Kuala Lumpur was dismissed on 24th January 1963.

By order of His Majesty the Yang di-Pertuan Agong dated 26th February 1964 he was granted special leave to appeal to the Board.

The appellant, who is of Chinese origin, is the proprietor of a retail business in Kuala Lumpur, where he has lived since 1940. His age was apparently not given in evidence, or at any rate is not recorded. The complainant was one Philomena Lim, a married woman, aged twenty-eight at the time, with a husband aged forty, and with three young children. At the time of the alleged offence she had been married nine years. Her husband was a civil servant in Kuala Lumpur. The complainant was a typist for the first four years of her married life. Since then

* See now section 60(1) of the Courts of Judicature Act, 1964.